S. Supreme Court, U.S.
FILED
NOV 6 1980
MICHAEL RODAK, JR., CLERK

No. 80-423

In the Supreme Court of the United States

October Term, 1980

J. G. CHISM,
Petitioner,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, EIGHTH APPELLATE DISTRICT CUYAHOGA COUNTY, OHIO

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF FACTS

The Respondent must initially apologize for the rather lengthy dissertation of facts which follows. However, in light of the basis on which Petitioner institutes this appeal, it is important that further clarification and additional facts be provided.

The incident giving rise to this lawsuit occurred on May 18, 1976, when the Petitioner, a locomotive engineer, and members of his crew were either setting off or picking up cars at the West 42 Street team track. (A "team track" is a track that runs off of the main track and is used to hold cars temporarily.)

The Petitioner claims that while he was engaged in his work some small boys threw stones or gravel at the locomotive. One of the small pieces of stone or gravel apparently struck him in the eye. The incident gave all indication of being fairly insignificant.

The Petitioner brought this action against the Respondent railroad alleging violations of the Federal Employers Liability Act and the Federal Boiler Inspection Act.

Petitioner's claim under the Federal Boiler Inspection Act was predicated wholly upon the fact that the sliding sash in the bay window on the engineer's side of the engine had been removed. These sliding sashes had been installed pursuant to an agreement between the railroad and the union that was entered into in 1959. This agreement requires bay windows to be provided from October to June of each year, with the union insisting that said windows be removed by June 1. Inasmuch as it is a physical impossibility to remove bay windows from 1,600 locomotives at the stroke of midnight on May 31, it was customary procedure for the railroad to start removing these bay windows around the middle of May each year. This was accomplished with the definite approval and insistence of the union.

The evidence presented during the course of the trial conclusively demonstrated that the sole purpose of the bay window is to protect the engineer from adverse weather conditions, and the window was never considered to be a safety feature. Although there was testimony by the Petitioner that the bay window could provide protection from foreign objects, there was no evidence adduced that the bay windows were designed or implemented for any purpose other than the protection of the union employees from inclement weather. Furthermore, it must be emphasized that the bay windows are not required

by the Federal Boiler Inspection Act or any federal regulation, and are not utilized on the Respondent's locomotives except during the winter months.

At the conclusion of the presentation of the evidence, the trial court held that as a matter of law the Federal Boiler Inspection Act was inapplicable, and refused to submit jury instructions concerning liability under the said Act. The trial court then proceeded to instruct the jury on liability under the Federal Employers Liability Act. The Petitioner did not object to the trial court's jury instructions, or to its alleged failure to instruct the jury on the Federal Boiler Inspection Act. The jury subsequently returned a unanimous verdict in favor of the Respondent railroad.

Petitioner initially appealed this decision to the Ohio Court of Appeals asserting that the trial court had erred in refusing to allow the jury to consider liability under the Federal Boiler Inspection Act. The Ohio Court of Appeals affirmed the trial court's decision, ruling that under established law the bay window was not an appurtenance of the Respondent's locomotive, and that the Federal Boiler Inspection Act was inapplicable to the instant case.

Petitioner then filed a Notice of Appeal and Memorandum in Support of Jurisdiction with the Ohio Supreme Court. The Ohio Supreme Court overruled Petitioner's appeal.

Petitioner has now petitioned this Court to grant a Writ of Certiorari. As shall appear hereafter, the Petition presents no federal question or true conflict between the state court's decision and the decisions of the federal courts, but merely expresses the Petitioner's dissatisfaction with the outcome of his case in the courts of the State of Ohio.

REASONS FOR DENYING THE WRIT

I. A TRIAL COURT PROPERLY REFUSES TO INSTRUCT THE JURY ON THE FEDERAL BOILER INSPECTION ACT WHEN THE EVIDENCE ADDUCED SHOWS NO VIOLATION OF SAID ACT AND ESTABLISHES THAT THE ACT IS INAPPLICABLE TO THE FACTUAL SITUATION.

Petitioner's position that the refusal to submit to the jury the issue of the Federal Boiler Inspection Act does not comport with federal decisions has absolutely no basis. On the contrary, the decision by the Ohio trial court is in complete accord with the decisions by this Court and the federal judicial system. *See Eckenrode v. Pennsylvania Railroad Co.*, 335 U.S. 329 (1948); *Smith v. Illinois Central Railroad Co.*, 486 F.2d 943 (5th Cir. 1973).

When the evidence presented by a litigant is clearly insufficient to demonstrate a violation of a federal statute, it is the unquestioned legal obligation of the trial court to remove that issue from the jury's consideration to prevent the possible miscarriage of justice. *Smith v. Illinois Central Railroad Co.*, 486 F.2d 943 (5th Cir. 1973). This Court recognized the above-mentioned principle of law in *Brady v. Southern Railway Co.*, 320 U.S. 476 (1943), stating:

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judg-

> ment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

Id. at 479-80.

Under the facts presented in the case at bar, the trial court properly refused to charge on the Federal Boiler Inspection Act because the Petitioner failed to prove a violation of the Act, and because the Act is simply inapplicable to the lawsuit.

The Federal Boiler Inspection Act, 45 U.S.C. § 23, reads in its entirety as follows:

> Section 23. *Use of unsafe locomotives and appurtenances unlawful; - inspection and tests*
>
> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28 to 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

The Federal Boiler Inspection Act does not purport to confer any right of action upon injured employees. *Urie v. Thompson*, 337 U.S. 163 (1949). It merely makes violations of its provisions "unlawful." Only when there has been a violation of the well-defined provisions of this Act

does the Act become relevant to an injured employee's action under the Federal Employers Liability Act. In these limited circumstances, the Federal Boiler Inspection Act imposes upon railroads "an absolute and continuing duty" to provide safe equipment.

Originally, the Interstate Commerce Commission had the authority for establishing rules and regulations pertaining to equipment on locomotives. In 1966, when the Department of Transportation was created, the provisions relating to safety appliances and equipment on railroad engines and carriers were transferred to the Secretary of Transportation. Presently, regulations pertaining to locomotives and equipment they must contain are found in the Code of Federal Regulations; specifically 49 C.F.R. §§ 230.00-230.458. In the case at bar, there was no evidence whatsoever of any violation of 45 U.S.C. § 23, and no evidence of any violation of any federal regulation.

The entire thrust of Petitioner's argument with respect to the applicability of the Federal Boiler Inspection Act is the fact that bay windows that were installed *pursuant to an agreement with the union during the winter months* had been removed. The accident occurred on May 18, 1976. Petitioner claims that the bay windows should not have been removed until June 1. (Parenthetically, Respondent would merely point out how specious Petitioner's argument really is. How something can be a violation of the Federal Boiler Inspection Act on May 18 but not be a violation of the Act two weeks later has never been explained.)

The fact of the matter is that the agreement between the railroad and the union is that the bay windows be removed during the summer months. In fact, the long-recognized practice of the railroad, at the insistence of the union, has been that the bay windows should be in-

stalled during the winter months and removed *"by June 1."* Furthermore, the evidence established that it is customary procedure for the railroad to begin removing the bay windows in the middle of May so as to have completed the task by June 1, and this is accomplished with the approval of the union. Therefore, if the bay windows had been actually removed from the locomotive on May 18, it was done with the concurrence of the union and in violation of no regulation.

Although the preceding discussion is important to demonstrate that the Respondent acted legitimately in removing the bay windows, it must also be stressed that there is *absolutely no federal requirement to have bay windows on a locomotive.* The Code of Federal Regulations, and specifically 49 C.F.R. §§ 230.00-230.458, sets forth the applicable rules and regulations for railroad engines. There is no requirement therein that locomotives be equipped with bay windows. *Respondent can find absolutely no legal authority, and there has been no case cited to this Court by the Petitioner, wherein the absence of an item that is not required by the Code of Federal Regulations constitutes a violation of the Federal Boiler Inspection Act.*

The most similar case Respondent can find rendered by this Court is *Southern Railway Co. v. Lunsford,* 297 U.S. 398 (1936). In that case, the railroad had put on a mechanism known as Wight's Little Watchman as a safety device. An accident occurred in which the mechanism failed properly to stop the train. Plaintiff alleged that the device was an "appurtenance" and since it did not work, there was a violation of the Federal Boiler Inspection Act. In its opinion, this Court stated as follows:

> We are unable to accept this view. With reason, it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for ex-

> perimental purposes, should become part thereof within the rule of absolute liability. So to hold would hinder commendable efforts to better conditions and tend to defeat the evident purpose—avoidance of unnecessary peril to life or limb. Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not. These have not been excluded from the usual rules relative to liability.

Id. at 402.

Cf. *Mahutga v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.*, 182 Minn. 362, 234 N.W. 474 (1931), *cert. denied*, 283 U.S. 847 (1931). In that case, the railroad had installed curtains over the windows in the locomotive but had failed to provide a tie-back mechanism for the curtains, none being required by the Interstate Commerce Commission. Plaintiff was injured when the curtains interfered with his duties, and he instituted an action under the Federal Boiler Inspection Act alleging that the curtains should have had a tie-back mechanism. The trial court granted judgment for the railroad after opening statements and thus refused to submit the case to the jury. The Supreme Court of Minnesota affirmed, stating:

> Plaintiff is here attempting to have a jury say that defendant is negligent in failing to install equipment in addition to that required by the Commission. We think this cannot be done. We are of the opinion that when the carrier complies with the requirements of the Interstate Commerce Commission, as it has done here, and therefore the act of Congress, it cannot be found guilty of actionable negligence because the plaintiff

> or a jury might think ordinary care required something additional.

Id. at 364, 234 N.W. at 476.

Therefore, Respondent contends that the applicable legal authority supports the position that the *absence* of an item that is not required by the Code of Federal Regulations cannot constitute a violation of the Federal Boiler Inspection Act, and should not be submitted as such for the jury's consideration.

It is also obvious that the reason that bay windows are required during the winter months is to protect the engineers from inclement weather. There was no evidence that these windows were designed, implemented, or supposed to be a safety feature. If the bay windows were a safety feature, they would certainly be required during the summer months. The bay windows, as such, cannot be considered an integral and essential feature of the locomotive, and thus, not an appurtenance thereto. *Southern Railway Co. v. Lunsford,* 297 U.S. 398 (1936).

The cases relied upon by the Petitioner in his Petition for a Writ of Certiorari are dissimilar and distinguishable from the case at bar. None of the authorities cited by the Petitioner pertains to liability under the Federal Boiler Inspection Act where there is an absence of an item not required by the Code of Federal Regulations. The pertinent cases cited by Petitioner deal with situations in which essential operating equipment of the locomotive has been alleged defective, or where there has been an allegation that a specific federal regulation was violated. For instance, the Petitioner relies heavily upon the case of *Lilly v. Grand Trunk Western Railroad,* 317 U.S. 481 (1943). In that case, this Court found that a jury could rightfully find for the plaintiff because a specific regula-

tion passed by the Interstate Commerce Commission had been violated. However, a clearly different situation obtains in the case at hand. The Petitioner has failed to establish a violation of the Federal Boiler Inspection Act, and the evidence adduced showed conclusively that the Act was inapplicable to the lawsuit.

Where there is no evidence to support an instruction on the Federal Boiler Inspection Act, the state trial court properly refuses to give such an instruction. *Smith v. Illinois Central Railroad Co.*, 486 F.2d 943 (5th Cir. 1973). Such a decision is unquestionably in accordance with, and in furtherance of, the decisions of this Court, the federal courts, and the intent of Congress in its promulgation of the Federal Boiler Inspection Act.

II. A PARTY MAY NOT CHALLENGE THE GIVING OF OR THE FAILURE TO GIVE ANY JURY INSTRUCTION UNLESS HE OBJECTS THERETO BEFORE THE JURY RETIRES TO CONSIDER ITS VERDICT, STATING SPECIFICALLY THE MATTER TO WHICH HE OBJECTS AND THE GROUNDS OF HIS OBJECTION.

Petitioner asks this Court for a Writ of Certiorari asserting that the state trial court should have instructed the jury on the Federal Boiler Inspection Act. As Respondent has already demonstrated, there is no basis for review in this Court because the trial court acted properly and in complete compliance with established law in refusing to provide such an instruction. Nevertheless, Respondent further submits that Petitioner should be estopped from presenting this Petition because he has waived his right to challenge the jury instructions under the applicable Ohio law.

Rule 51(A) of the Ohio Rules of Civil Procedure, similar to the corresponding Federal Rule, provides in relevant part:

> A party may not assign as error the giving or the failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection.

See also, Iannacito v. Denver & Rio Grande Western Railroad, 380 F.2d 1019 (10th Cir. 1967).

The Ohio Supreme Court, in its interpretation of Rule 51(A), has admittedly held that a formal objection to the court's charge is not necessary where the record affirmatively shows that the trial court has been fully appraised of the correct law governing a material issue in dispute, and that the party has unsuccessfully requested the inclusion of that law in the trial court's charge to the jury. *Presley v. Norwood,* 36 Ohio St. 2d 29, 303 N.E.2d 81 (1973). However, the Ohio Supreme Court in that same decision ruled:

> A party whose request for jury instructions fails to embody the correct law governing an issue, and who otherwise fails to comply with Civ. R. 51(A), waives his right to question the trial court's charge upon appeal.

Id. at 29, 303 N.E.2d at 81.

In the case at bar, the Petitioner not only failed to object to the jury's charge, but also submitted proposed jury instructions that failed to embody the correct law governing the Federal Boiler Inspection Act. Thus, in accordance with the applicable Ohio legal authority, the Petitioner has waived his right to challenge the jury instructions.

During the discussion of the trial court's charge, prior to final arguments, the court advised Petitioner that it was not submitting the case to the jury under the Federal Boiler Inspection Act. Petitioner failed to object to this decision at that time, or at any other time before the jury retired to consider its verdict. At the conclusion of the trial court's jury instructions, the following colloquy occurred:

> THE COURT: Gentlemen, before I go any further with instructing the jury as to their procedure and explaining the verdict forms, is there anything by way of addition to, deletion or subtraction from the charge as given? What say the plaintiff?
>
> MR. BERNSTEEN: *I have none, your Honor. Thank you.*

Furthermore, the Petitioner's proposed jury instruction read as follows:

> 1. If you find all five (5) of the following:
>
> a. the bay window is a part or appurtenance of the locomotive;
>
> b. the bay window was defective;
>
> c. the defect made the locomotive unsafe to operate without unnecessary peril to life or limb;
>
> d. the Plaintiff was injured; and
>
> e. the defective bay window contributed to the injury;
>
> Then you must find for Plaintiff, bearing in mind that no notice of the defect or unsafe condition is necessary to Plaintiff's case.

This proposed jury instruction fails to correctly embody the law governing the Federal Boiler Inspection Act for several noticeable reasons. It makes absolutely no reference to the Federal Boiler Inspection Act and fails to embody the language of the Act. It makes no reference whatsoever to the burden of proof. In two places it discusses the bay window as being "defective," although there was absolutely no evidence in the case that the bay window was defective and the Act makes no reference to "defective" equipment.

Therefore, it is clear that Petitioner did not comply with Rule 51(A), and inasmuch as Petitioner's proposed jury instruction failed to embody the correct law pertaining to the Federal Boiler Inspection Act, Petitioner has waived his right to question the Ohio trial court's charge on this point.

CONCLUSION

The foregoing discussion demonstrates that Petitioner has no basis for invoking the jurisdiction of this Court. There is absolutely no conflict that exists between the result in the instant case and the decisions of the federal judiciary. When the evidence adduced showed no violation of the Federal Boiler Inspection Act, the trial court acted properly in refusing to submit the Act for the jury's consideration. Furthermore, because Petitioner failed to comply with Ohio procedural law, he has waived his right to challenge the jury instructions.

Petitioner's claims have been fully adjudicated in the courts of Ohio. Although he is obviously dissatisfied with the rulings of the Ohio courts, that is certainly no justification for a further appeal to this Court. It is therefore

respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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SERVICE

A copy of the foregoing Brief of Respondent in Opposition to Petition For a Writ of Certiorari was mailed to Herbert L. Bernsteen, and Deborah Purcell Goshien, Attorneys for Petitioner, Suite 712, 75 Public Square, Cleveland, Ohio 44113, on this 4th day of November, 1980.

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